



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 196 OF 2014

HIGHBEAM LIMITED.....PLAINTIFF

VERSUS

MARIARIA WILBERFORCE NYABOGA T/A

MARIARIA & CO. ADVOCATES.....DEFENDANT

RULING

By Notice of Motion dated 30th June 2014 under certificate of urgency, the plaintiff/applicant High beam Limited filed this application against Mariaria Wilberforce Nyaboga Advocate T/A Mariaria & Co. advocates, pursuant to the provisions of Order 39 Rule 1, order 40 Rule 1(b), 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. They sought orders:-

1. Spent

2. That pending hearing and determination of this application, a temporary injunction do issue restraining the defendant, his servants and or agents from transferring, disposing, withdrawing or parting with possession of all money held in account No. 0010025007258701 at Eco Bank or any bank account in the name of the defendant.

3. That pending hearing and determination of the suit, an injunction do issue restraining the defendant, his servants and or agents from transferring, disposing, withdrawing or parting with possession of all his movable properties as well as money held on account number 0010025007258701 at Eco Bank or any bank account in the name of the defendant.

4. That the Honourable court be pleased to order the defendants to deposit security of costs in court pending hearing and determination of this suit.

5. That money held in the defendant's bank accounts being account No. 0010025007258701 at Eco Bank or any bank account in the name of the defendant be attached pending hearing and determination of the suit.

6. Those costs of this application be provided for.

The application is premised on the grounds that:-

I. The plaintiff through their advocates Daly & Figgis entered into a sale agreement with Brigadier Duncan Kireri Wachira who was represented by the defendant herein.

II. That a deposit of purchase price amounting to Kshs 3,200,000 was paid to the defendant to hold as stakeholder pending completion of the transaction.

III. The defendant had forwarded a copy of title for the said land parcel to the plaintiff to conduct a search prior to the agreement.

IV. The defendant thereafter issued an original certificate of title to the plaintiff and upon trying to verify its authenticity the plaintiff was informed that the title was a forgery.

V. The defendant after having been informed that the transaction was void for want of good title undertook to release the deposit of the purchase price held by him to the plaintiff but has since refused to release the same to the plaintiff.

VI. The defendant is culpable of fraudulent misrepresentation and professional misconduct.

VII. It is imperative that the defendant be restrained by way of injunction from withdrawing any money held in his accounts pending hearing and final determination of this suit.

VIII. The plaintiff further fears that the defendant will dispose of his property and money held in his account or elsewhere in a bid to frustrate the plaintiff's effort at recovery hence the same should be attached pending suit.

IX. The plaintiff is also apprehensive that the defendant may abscond and leave jurisdiction of this court, hence the need for orders for deposit of security for costs.

The application is further supported by the affidavit of Rajesh Maneklal Rughani, a Director of the plaintiff company sworn on 30th June 2014.

The defendant opposed the application by filing a replying affidavit on 4th September 2014 and a further replying affidavit on 11th July 2014. The plaintiff also filed a further affidavit on 18th July 2014.

The parties agreed to dispose of the application by filing written submissions. They also agreed to make highlights of their submissions. The plaintiff/applicant filed their submissions on 30th September 2014 whereas the defendant/respondent filed his on 24th October 2014. The parties' advocates appeared before me on 17th November 2014 with Mrs Waiganjo advocate representing the plaintiff/applicant while Mr Mariaria advocate was self represented.

In her submissions in support of the application, Mrs Waiganjo gave a brief history of the case between the parties to this suit. She stated that by a sale agreement dated 22nd May 2013 between the plaintiff and the defendant's client one Brigadier Duncan Kireri Wachira, the latter agreed to sell to the former a piece of land described as LR No. 9104/91 original NO. 9104/80 situated in Nairobi City for a consideration of Kshs 32,000,000.

It was further agreed that pending the completion of the sale transaction the plaintiff would pay and did pay a deposit of 10% thereof to the defendant's the sum of Kshs 3,200,000/- which sum of money was to be held by the defendant herein on a stakeholder basis pending the transfer and or satisfactory search by the purchaser that the title to the property in question was held by the vendor.

Further, that indeed, the defendant advocate did forward to the plaintiff's advocates- Daly & Figgis a copy of original title to the land but took a long time to forward the original executed agreement and when the plaintiff decided to conduct a due diligence and search from the lands registry to determine the authenticity of the title, they discovered that the said title was not genuine as shown by the statement

recorded with Central Police Station by one Mr Joseph Kamuyu, the Land Registrar, who confirmed that the original title did not emanate from the lands office and that the photocopied title used to conduct the initial search materially differed with the original title forwarded by the defendant advocate. Subsequent to those events, the advocates for the purchaser, Ms Daly & figgs requested for refund of the 10% deposit held by the defendant as stakeholder, as shown by the various correspondences including mails exchanged with the defendant but the defendant refused to release the money which prompted a report being made at the Central Police Station.

The defendant did record his statement with the police concerning the foiled transaction following the discovery of the title to be fake and that he undertook to refund the money upon being given reasonable notice, which notice was served on him through emails and letters but he refused to remit the money.

Mrs Waiganjo pointed out that from the defendant's bank statement obtained from Eco Bank Ltd; the Kshs 3,200,000 was received and immediately withdrawn. The following day after deposit on 22nd May 2013 and that before the deposit therein, there had been a negative balance, and the said account has no funds, an indication that the defendant advocate utilized the money for his own purpose contrary to the agreement that he was to hold it as stakeholder.

Further, that the defendant even after being notified by Daly & Figgs advocates that the material title documents were fake, the defendant did not remedy the situation but instead, he gave a false undertaking to the police who were investigating the matter, to the effect that he would refund the money, only to change his mind and later claimed that he surrendered the money to his client the vendor as forfeited money after the period lapsed.

In Mrs Waiganjo's view, the defendant could not have released the money to the vendor after he had been informed that the title document was fake and even after he had given an undertaking to refund the said money to the purchaser. Further, that in the event that he did release the funds as alleged, then it would have been very irresponsible of an advocate of this Court who had a duty of care to ensure the transaction goes in the right direction.

Further, that it would possibly not be true that the defendant released the money to the vendor as alleged in the acknowledgment as the said money was withdrawn from the bank a day after its deposit on 23rd May 2013 whereas the acknowledgment was for 13th September 2013, which acknowledgement she doubted as to its legitimacy since it came after the defendant had recorded a statement with the police.

Mrs Waiganjo further questioned why the defendant had not procured an affidavit from the vendor on the issue of release of the money. She relied on the authorities of **ELC 83/11 Joyce Irene Atieno Akeyo vs Michael George Okeyo & 4 others**; and **Osoro Magikoyo T/O Osoro Mogikoyo & co. advocates vs Jared Omollo & another HCCA 324/2006** to demonstrate the duty of care that the defendant owed to both parties to the agreement for sale of land to ensure that the transaction went in the right direction.

In opposing the application, Mr Mariaria advocate who is also the defendant/respondent argued, relying on his replying affidavit and further replying affidavit that the application under Order 39 and 40 of the Civil Procedure Rules is incapable of being granted as the statement of account for account No. 0010025007258701 as exhibited showed a credit balance of only Kshs 56/-. In his view, based on the authorities in **Nairobi HCC 15/2014 International Air Transport Association & another vs Akarim Agencies Ltd & another**, **ELC HCC 294/2001 Atul Shah & another vs Bharat Foulter & another** and **Nairobi HCC 589/2007-Jerry Njuguna vs J.H. Ltd** that the applicant had not satisfied the court to warrant granting of the orders sought, which are in the discretion of the court among the conditions are that:-

- i. There must be property being sold by the defendant to defeat the outcome of the suit if successful at the end of the day.
- ii. The defendant is most likely or is about to leave the jurisdiction of the court.

iii. The property must be identified specifically, as the injunction or attachment must be specifically directed to a quantifiable property.

iv. Mr Mariaria asserted that there must be evidence that he held certain property which was about to be sold or that he was absconding or about to leave the jurisdiction of the court.

v. The plaintiff must also demonstrate that it had a good case with real good chances or probability of success.

According to Mr Mariaria, the 10% deposit was no longer held by him and having acted for a known vendor, who entered into negotiations with the plaintiff, the defendant should not be asked to refund any money to the plaintiff.

Further, that the plaintiff had not shown that the defendant had the said money or established any case with a probability of success to enable this court exercise its discretion in their favour.

In the defendant's view, the plaintiff violated the agreement and it is therefore not entitled to a refund of deposit which he has already paid to his client as forfeited money. He submitted that it was agreed that within 90 days from 22nd May 2013 the plaintiff was to furnish an undertaking as to availability of the 90% purchase price and thereafter given 21 days seeking for extension which it did not seek.

Further, that although the money was withdrawn from the account the following day after it was deposited, it was not demonstrated that it could not be released elsewhere and neither does it mean that it was expended by the advocate for his own purpose. He conceded that the money was only utilized after the expiry of 90 days and that as the plaintiff had not sued the vendor, the defendant was not liable.

In addition, the defendant charged that the plaintiff had filed disciplinary proceedings against him pursuant to the provisions of the Advocates Act. He also pointed out that as the suit was not filed with summons to enter appearance, it was invalid and prayed for dismissal of the plaintiff's application with costs. He further submitted that he had filed a Judicial Review Application which was pending in the High Court.

In response, Mrs Waiganjo submitted that although the defendant had mentioned the statement of accounts as attached not having any monies capable of being attached, he had not answered the question of where the money that was withdrawn on 23rd May 2013 went and hence, her client's conclusion that the defendant utilized the money.

That the defendant having admitted on his own statement and undertaking to the police that he had the money and was ready to refund it, the plaintiff had established a good case with probability of success. And that the defendant had evaded the question of why security for costs could not be deposited. She further submitted that disciplinary proceedings under the Advocates Act could not stop the proceedings herein. She maintained that they had demonstrated that the defendant had utilized the money and it was therefore upon the defendant to explain how he had paid out the said money as the purported acknowledgement by the vendor was highly doubtful.

I have carefully considered the plaintiff's application dated 30th June 2013, the grounds thereof, and the supporting affidavits by the applicant's director as well as the replying affidavits by the respondent, the authorities cited and the rival submissions as filed by both parties advocates and as highlighted together with the law applicable in the circumstances of this case.

The genesis of this case and as summarized by Mrs Waiganjo, emanates from an agreement for sale dated 22nd May 2013 between Brigadier Duncan Kireri Wachira (the 'vendor') and High Beam Ltd (the 'purchaser') respecting Land Reference NO. 9104/91 original No. 9104/14/80 (the 'property'), which agreement was drawn by M/S Mariaria & Co. Advocates, the defendant herein. The agreed purchase

price was Kshs 32,000,000. The purchaser's advocates were Daly & Figgis Advocates.

Under clause 31 of the said agreement, the deposit of 10% was agreed to be paid by the purchaser to the vendor's advocate upon execution of the said agreement as acknowledged, to be held on a stakeholder basis pending the due effective registration of the transfer of the property in favour of the purchaser; and under clause 3.3 the vendor shall deposit the original Title Deed with the purchaser's Advocates ONLY UPON receipt of the 10% purchase price aforesaid, from the purchaser. Under clause 3.4, the balance of the purchase price shall be secured by an undertaking to the vendor's advocates by the purchaser's financiers or such financier's advocates (as the case may be).

In the special condition thereof, it was further agreed that the sale and purchase was subject to among others:-

“

1.

2.

3.

4. *The purchaser carrying out a search and survey of the property and the results thereof being satisfactory (in- the sole opinion of the purchaser.)*

It was further stated that the above special conditions have been set for the benefit of the purchaser who may at any time by notice in writing waive any of them.”

The completion date was stated to be “ninety (90) days from the date of execution of this agreement or such other dates as the parties may agree in writing (the completion date”).

Clause 1 therefore makes provision for failure to complete or comply with any conditions by the purchaser in which event, the vendor shall give the purchaser 21 days notice in writing confirming the vendor's readiness to complete the sale in all respects and specifying the default, and requiring the purchaser to complete and /or remedy the default before the expiration of such notice and if the purchaser fails to comply with such notice the vendor would be entitled to either rescind the agreement; retain the deposit as the agreed liquidated damages; and thereafter be at liberty to resell the property and the vendor's would have no further rights or claims against the purchaser.

On the other hand, in the event that the vendor defaulted under the agreement, the purchaser would give him 21 days notice in writing to comply with his obligations and specifying the default and requiring him to make good or comply with the notice and if no compliance, the purchaser can elect to: sue for specific performance and in addition claim for such loss or damage as the purchaser may have suffered as a result of the vendor's failure to complete; or rescind the agreement; seek reimbursement of deposit with interest and all expenses incurred by the purchaser pursuant to the agreement; and liquidated damages in an amount equal to the deposit as compensation for loss of opportunity and other loss suffered. Clause 11.4 stipulates that in the event that the registration of the transfer of the property in favour of the purchaser and the charge in favour of the purchaser's are not progressing due to among others and including but not limited to possible defects in the title to the property, and the reasons are such that, in the purchaser's opinion, it is not within the powers of the vendor to rectify within reasonable period, then the vendor acknowledged and agreed that the vendor would forthwith upon the purchaser's election to rescind the agreement pay the sums(including deposit) as set out in clause 11:2:2 and any undertaking issued by the purchaser's financier(s) or purchaser's financier's advocates pursuant to the advocate shall stand automatically revoked.

Clause 15 related to warranties among them 15.6: the property is not on a buffer zone, road, or forest, riparian reserve or public land and its ownership thereof is not subject to any challenge whatsoever

from the government of Kenya, any local authority or any third party whatsoever. Under clause 15.7: the vendor is not engaged in nor threatened by any litigation, arbitration or administrative proceedings relating to the property and having made due and careful inquiry, there is no fact or circumstance likely to give rise to any such litigation, arbitration or administrative proceedings.

In clause 15.10: the vendor has to the best of his knowledge disclosed to the purchaser all material information relating to the property.

Under clause 15.13: the vendor agreed to indemnify the purchaser from any proceedings, loss, damages, or other sanctions arising directly or indirectly arising from breach of the warranties in any manner.

Under clause 27, contractual rights of third parties are not recognized for enforcement of any term of the agreement.

In clauses 28 and 29 parties agreed to be bound by the terms of the agreement and submitted to the jurisdiction of the courts of Kenya.

The said agreement was received for registration in the Registry of Documents on 5th August 2013 at 15.55 hours under Presentation No. 536, Volume D folio 153/2891 file MM x 111 by Mr C.K. Ngetich 212 Registrar of Documents Nairobi.

On 21st May 2013, the defendant herein issued a duly signed irrevocable professional undertaking to the plaintiffs advocates Daly & Figgis to release the original title document (certificate of title relating to the land in question upon receipt of the 10% deposit pending the other completion documents. He also enclosed 3 copies of the sale agreement duly executed by his client. On 22nd May 2013 the 10% deposit was released to the defendant's Bank account at Eco Bank through RTGS A/C No.0010025007258701 by Rughani Investments Ltd with Victoria Commercial Bank Ltd Nairobi in the sum of Kshs 3,200,000. The defendant also advised the plaintiff's advocates as 30th May 2013 that he had lodged the said agreement with the Registrar and was in the process of gathering all other relevant completion documents in addition to the enclosed certificate of title.

By a July 2nd 2013 Mail from a Mr Muhammad to Daly Figgis & company, he enquired, raising concerns why the stamping had taken such a longer time than usual and asking them to write to the vendors advocates requesting for progress on the stamping of the sale agreement and copy to them (client).

Mr Mariaria advocate who is the defendant contends that the plaintiff was in breach of the sale agreement as to completion date of 90 days from 22nd May 2013 to give an undertaking as to the availability of the balance, after paying deposit of 10%. However, the available evidence, shows that after 22nd May 2013 the completion date was subject to the defendant transmitting to the plaintiff's advocates duly executed agreement, which agreement was only submitted on 8th August 2013 which fact is not denied by Mr Mariaria. It was during this delayed period that the plaintiff sensing that there was something amiss, and decided to conduct a personal search at the lands registry using the original title that it discovered that the said title was fake.

Further, it was confirmed by the lands officer Registrar Mr Joseph Kamunyu that the original title as submitted by Mr Mariaria differed from the copy which latter copy was used during the signing of the sale agreement. The above position was notified to Mr Mariaria, during which time, no doubt, he still held the 3.2 million as a stakeholder as shown by his own self recorded statement with Central Police Station on 23rd October 2013. He cannot, therefore, in my view purport to have released the money as forfeited deposit to the vendor.

The only issue for determination in this application is whether on the facts and circumstances of this case, the court is inclined to order for security for costs against the defendant.

In my humble view, the agreement subject matter of this suit became void the moment the plaintiff discovered that the vendor and his advocate had stolen a match on them and therefore there was nothing capable of being enforced. What remained was reimbursement or return of the deposit held by Mr Mariaria being an advocate stakeholder and nothing more.

The defendant's bank account with Eco bank Ltd clearly shows that the money that was received therein on 22nd March 2013 was quickly withdrawn the following day on 23rd May 2013. Mr Mariaria has not explained to the satisfaction of the court where this money went as at that time. His attempted explanation through his further replying affidavit that he released it to the vendor on 13th September is to say the least, not persuasive. I have had occasion to carefully examine the acknowledgement purportedly signed by the vendor on 13th September 2013, which acknowledgement, besides the signature for Mr Duncan Kireri Wachira, has a left thumb print attested by Mugambi S. Gathungu Advocate & Commissioner for Oaths. I have also seen the letter dated 19th August 2013 by Mr Mariaria purportedly written to Daly & Figgis Advocates, purporting to give notice of 21 days to complete sale in accordance with Clauses 9 and 11 of the sale agreement.

With utmost respect, I find no sincerity in those two documents. It cannot be that in October 2013 Mr Mariaria is saying in his statement to the police that upon learning that the titles were not genuine, he "advised the purchaser to write letters recalling the money pursuant to Clause 11 of the sale agreement, and that he had since been waiting to receive the 21 days notice so as to refund the money that "I am still holding" and that "I am ready to refund the money to the purchasers upon a reasonable notice; while at the same time purporting on 19th August 2013 to say that he was giving 21 days notice upon whose expiry the contract will stand rescinded and deposit paid forfeited to the vendor in accordance with Clause 11 of the sale agreement, then at the subsequent date of 13th September 2013 purport to have paid out the 3.2 million forfeited to his client the vendor .

Furthermore, what was the necessity for the thumb print on the acknowledgment for money if the vendor had signed the agreement? In addition, the acknowledgement refers to the sale of **LR No. 209/11095/39 Nairobi and not LR NO. 9104/91 (original NO. 9104/14/80 ("the property"))** quoted or purportedly sold) or purchased vide the sale agreement of 22nd May 2013. It cannot, therefore, possibly be true that the defendant released money to the vendor as the property quoted was completely different from the one purportedly sold which is **LR NO. 9104/91 ORIGINAL 9104/14/80** quoted in the sale agreement.

I have further carefully examined the signature on the acknowledgement of 19th August 2013 and the sale agreement of 22nd May 2013 and make the following observations:- that the said signature of one Brigadier Duncan Kireri Wachira as appended on the sale agreement appears to have been cut and pasted on the acknowledgement and one does not require a handwriting expert to discern the accuracy with which that signature is a replica –not similar but the same as that on the sale agreement.

I have no doubt in my mind that the two documents acknowledgment and letter of 19th August 2013 were authored with the intention of defeating the claim herein and unfortunately, the acknowledgement lacks the precision in relation to the relevant parcel of land thereby letting the cat out of the bag. Obviously the acknowledgement must have referred to a different transaction all together!

In addition, the letter of 19th August 2013 from the defendant does not show that it was received by anybody, contrary to clause 25 of the sale agreement stipulating that "any notice to be given to any party to this agreement shall be in writing and shall be deemed to be duly served upon hand delivery to the physical address of the firm of advocates.

The defendant does not deny the reference to the meeting he held with the representative of Daly & Figgis Advocates the morning of 4th September 2013 and hence, it is unbelievable that the defendant would on 4th September 2013 be in the clear know that the agreement was void but nonetheless proceed on 13th September 2013 to release the deposit to the "vendor."

Furthermore, the emails of 13th, 16th, 19th and 20th August 2013 clearly sought audience with the vendor for the extension of the completion date, after the request for remittance of the deposit on 5th September 2013 failed.

On the defence that this suit is intended to subject the defendant to ridicule, difficult and embarrassment, I find that the defendant advocate has indeed embarrassed himself before this court and the public at large. He has tried to cover up a trail of wrong doing on his part but in the end, he has soiled himself with mud and has himself to blame for the fate that has befallen him.

In my view, this is a case where both the advocate and his 'client' the 'vendor' if at all he existed must face the seat of justice to explain the circumstances under which a fake title document was used to entice the plaintiff part with 3.2 million and narrowly escaped losing Kshs 32 million. I have no doubt in mind that the defendant benefited from the payment and not his "client the "vendor" and therefore in law and equity he is under an obligation to refund the money. I find that the plaintiff has an arguable case against the defendant, who has not sought any indemnity from his 'client.'

As a stakeholder to the sale agreement, which fact is not denied, the defendant was under an obligation to retain the money until the sale was completed and thereafter remit the money to his client as per the sale agreement terms and conditions and especially Clause 3:3: 2(1) a which required release of funds only after effective registration of transfer of property in favour of the purchaser.

However, the bank statements for the defendant's clients account shows that the defendant spend and exhausted the money before the sale was completed and, curiously, hardly a day after he was paid the money. The money was meant to be held in trust and not for expenditure. Neither was the money due to his "client" until all necessary conditions contemplated under the sale agreement were fulfilled.

The defendant, in my view, under those circumstances was not authorized to disburse the money and even if his client solicited for it at that moment before the completion of the sale, as an advocate of this court, the defendant was professionally obliged to conduct due diligence as he owed a duty of care to both his client and the plaintiff on whose behalf he held the money as stakeholder.

This court observes that the acknowledgement note by his client had no relation or relevance to the property that was being transacted. It also does not show a credible date when the money was paid out to the defendant's client. The money was effectively withdrawn on 23rd May 2013 and the acknowledgement was signed on 19th August 2013, nearly three months later. That conduct by the defendant betrays him. How could such huge sums of money be withdrawn in cash on 23rd May 2013 and disbursed without any acknowledgement thereof until three months later.

In my view the manner in which the defendant dealt with the plaintiff was not consistent with professionalism required of him as stakeholder and in this instance, the case of **Osoro Magikoyo Advocates vs Jared Omollo & Another HCA 324/2006** is applicable.

Having made those observations, the question is whether his court should grant the order for security for costs or any other order to preserve the subject matter of the suit as sought by the plaintiff.

The power to order for security for costs is a discretionary one, depending on the circumstances of each case. In this case, I find that the plaintiff has shown a bona fide claim against the defendant. it has demonstrated that indeed, the 'sale' was a sham and that the defendant who held both copies of "original" title documents on behalf of his 'client' had knowledge that those documents which he held did not refer to one and the same title of land capable of being sold out to the plaintiff.

Further, the defendant's conduct in the whole transaction paints him as having been part of a fraudulent scheme to defraud the plaintiff of its hard earned cash. The defendant received the money to hold in trust but utilized it within 48 hours and in a bid to cover up the trail manufactured the documentation to show that he had paid out the money to his non-existent client over a nonexistent

parcel of land. He also created a situation that looks like there was breach of contract on the part of the plaintiff when in essence, there was no such breach.

In addition, the account where the money was deposited and swiftly withdrawn has been depleted. There is no real evidence that the defendant has any intention of depositing therein any money or at all, now or in future.

That being a client's account, it would not even be appropriate to freeze or injunct it anyway as it would have a ripple effect of subjecting his innocent clients to unnecessary hardship for no mistake or theirs. A freezing order is normally intended to restrain or to enjoin a person from dissipating an asset directly or indirectly.

In Goode in Commercial Law 4th Edition at pg 1287, the authors state:

“the grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction the court will usually require to be satisfied that:

- a. The claimant has a good arguable case based on a pre-existing cause or action.**
- b. The claim is one over which the court has jurisdiction.**
- c. The defendant appears to have assets within the jurisdiction.**
- d. There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.**
- e. There is a balance of convenience in favour of granting the injunction.**
- f. The court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets.**

Where there is a relationship of trust, tracing of the assets as an equitable remedy can issue.”

In this case, I would hesitate to order for a freezing order. The best the court can do would be to order for disclosure of the defendant's personal assets/bank accounts to ascertain the assets he holds. This is so because it was not shown or demonstrated as to what assets the defendant holds or owns.

In this case, there exists a reasonable circumstance for the court to exercise discretion in favour of the plaintiff who has demonstrated that it has an arguable case. It was however not shown that essentially, the defendant intends to leave the jurisdiction of the court. The court must therefore look into different issues such as whether the defendant is willing to deposit such security or to disclose what assets /bank accounts he holds.

In the instant case, the defendant did not disclose to the court that he owns any assets or property capable of realizing the decree if passed against him, instead he cast/placed the burden of proving or identifying and specifying what he owns on the plaintiff entirely. That in itself shows that a lot of hardship and injustice could be caused to the plaintiff to trace the assets of the defendant for attachment if it were to obtain decree in their favour in this suit. This court observes that Mr Mariaria advocate did not file any affidavit of means which could have assisted the court in exercising any judicial discretion in his favour. He withheld all the information from the court and chose to be defensive.

The court therefore finds itself persuaded by the plaintiff that in the absence of proof of any assets held by the defendant, which fact this court has anxiously considered against the backdrop of the affidavit evidence and submissions by both parties, this court finds that this is a suitable case where the

court would exercise its discretion in favour of the plaintiff and order the defendant to deposit security for costs.

The defendant, in any event, has his unfettered right to be accorded a fair hearing as guaranteed under Article 50(1) of the Constitution. Therefore, while ordering for security for costs, the court bears in mind that there are pending disciplinary proceedings against the defendant under the Advocates Act, as well as the criminal charges which he is seeking to quash by way of Judicial Review proceedings. He, however, did not disclose to this court at what stage those proceedings were. This court will nonetheless not make any orders that may jeopardize or impede the defendant's right to a fair hearing.

For those reasons, this court makes the following order:-

1. The defendant Wilberforce Nyaboga Mariaria advocate do furnish or cause to be furnished to this court security for costs in the sum of kshs five million kshs 5,000,000 by cash deposit or by bank guarantee issued by a reputable financial institution, to be deposited in this court and to be held by the court until this suit is heard and determined.

2. The said sums of money or bank guarantee shall be deposited or furnished with 21 days from the date of this ruling.

3. In default of compliance with the orders herein above by the defendant, the defendant shall forfeit the right to defend the suit and the plaintiff shall be at liberty to proceed and prosecute the suit exparte.

4. Prayers 3 & 5 of the application dated 30th June 2014 are declined for reasons advanced in the ruling.

5. The plaintiff shall have costs of this application.

Dated, signed and delivered at Nairobi this 8th day of May 2015

R.E. ABURILI

JUDGE

8.5.2015

8.5.2015

Coram Aburili J

C.C. Kavata

Mrs Waiganjo for plaintiff/applicant

No appearance for defendant in person

COURT- Ruling read and delivered in open court after it was not cause listed for 19th February 2015.

R.E. ABURILI

JUDGE

8.5.2015

Mrs Waiganjo- I apply for a certified copy of the ruling.

R.E. ABURILI

JUDGE

COURT- Certified typed copy of the ruling to be supplied to the plaintiff upon payment of the requisite fees.

R.E. ABURILI

JUDGE

8.5.2015